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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 481

UNITED STATES OF AMERICA, ON THE RELATION OF WALTER GUSTAV BEJEUHR, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE AT NEW YORK, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 20) is not reported. The opinion of the Court of Appeals for the Second Circuit (R. 23–25) is reported at 177 F. 2d 436.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 7, 1949 (R. 25). The petition for a writ of certiorari was

filed on December 14, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below correctly held that the cessation of active hostilities between the United States and Germany does not invalidate a removal order, issued against petitioner by the Attorney General under the Alien Enemy Act and Presidential Proclamation 2655.

2. Whether the district court erred in allegedly refusing to receive evidence in support of the petition for the writ of habeas corpus, where the petition and other papers in the proceeding raised only issues of law, concerning which the district court heard argument by counsel.

STATUTE, PROCLAMATION, AND REGULATIONS INVOLVED

The provisions of the Alien Enemy Act of 1798, R. S. 4067–4070, as amended, 40 Stat. 531, 50 U. S. C. 21–24, are set out in Appendix A, *infra,* pp. 13–15. The text of Presidential Proclamation 2655 (59 Stat., Part 2, 870; 10 Fed. Reg. 8947) is set forth in Appendix B, *infra,* pp. 16–18. The Attorney General's regulations issued pursuant to Proclamation 2655 are set forth in Appendix C, *infra,* pp. 19–21.

STATEMENT

Petitioner, a German alien enemy, was born in Hamburg on December 5, 1900 (R. 19). He

entered the United States as a quota immigrant in 1928, has continuously resided here, but never acquired United States citizenship (R. 6, 7, 16). Shortly after Pearl Harbor, petitioner was interned as a potentially dangerous alien enemy (R. 7).

On July 17, 1946, the Attorney General, after a hearing held before a Repatriation Hearing Board, issued an order in accordance with Presidential Proclamation 2655 of July 14, 1945, declaring petitioner "to be dangerous to the public peace and safety of the United States" and ordering him to depart from the United States (R. 18). Petitioner then instituted this proceeding by filing a petition for a writ of habeas corpus in the District Court for the Southern District of New York on December 26, 1946 (R. 5–15). The petition challenged the validity of the Attorney General's removal order, alleging that a state of war "does not exist between the United States of America and the government of the place of your petitioner's birth" (R. 11). The writ was issued on the date of filing of the petition (R. 14–16). In the return to the writ, filed by respondent on January 10, 1947, it was shown that petitioner was being held in custody as an alien enemy under Section 21 of the Alien Enemy Act; that he was a "native, citizen, denizen or subject of Germany"; and that he was ordered removed from the United States by the above-described order of the Attorney General

(R. 16). A copy of the removal order was annexed to the return (R. 17–18). Petitioner filed a traverse denying generally the allegations in the respondent's return but admitting that he was born at Hamburg on December 5, 1900, and alleging again that he is "not an alien enemy of the United States of America because a state of war does not exist between the United States of America and the government of the place of * * * [his] birth" (R. 19).

On June 17, 1949, after hearing argument by counsel, the district court ordered that the writ be dismissed and that petitioner be remanded to respondent's custody (R. 4, 20; Pet. 3, 4). Upon appeal, the court below affirmed that order (R. 23–25).

ARGUMENT

This is the third in the series of attempts to bring again before this Court aspects of the alien enemy deportation program which were fully considered in *Ludecke* v. *Watkins,* 335 U. S. 160. In both prior cases this Court denied certiorari. *United States ex rel. Dorfler, et al.* v. *Watkins,* 171 F. 2d 431 (C. A. 2), certiorari denied, 337 U. S. 914; *United States ex rel. Hoehn* v. *Shaughnessy,* 175 F. 2d 116 (C. A. 2), certiorari denied 338 U. S. 872. Since the decision of the court below in the instant case, like its decisions in the *Dorfler* and *Hoehn* cases, is clearly correct and presents no conflict, there is no more reason for review here than there was in those cases.

1. The gist of petitioner's attack on the judgments below is that the "war against Western Germany had been ended" and that, therefore, the Attorney General's removal order is unenforceable (Pet. 10). Petitioner further argues that he may no longer be deemed an alien enemy, and that he is entitled to a judicial review of the basis for his removal.

a. The conclusive answer to petitioner's principal contention is this Court's holding in the *Ludecke* case, to the effect that despite the cessation of actual hostilities, the war with Germany has not yet ceased for the purposes of the Alien Enemy Act of 1798. The power to remove alien enemies, it was there pointed out, continues until the state of war has been terminated by some political act, such as "treaty or legislation or Presidential proclamation." 335 U. S. 160, 168.

Petitioner seeks to escape the impact of this holding by referring to certain events occurring since that opinion was handed down: the nomination of Mr. John J. McCloy as United States High Commissioner to Germany, with a rank equivalent to that of ambassador, and the West-Bonn Agreement of November 22, 1949 between the Western Allied High Commissioners and the Chancellor of the German Federal Republic (Pet. 10). It is obvious, however, that neither of these events can, by any stretch of the imagination, be considered equivalent to a peace treaty ratified by the Senate or a congressional resolution or Presiden-

tial proclamation formally terminating the war. In fact, the provision of the West-Bonn Agreement quoted on page 10 of the petition, far from justifying petitioner's view that the war is over, itself recognizes that "the question of the termination of the state of war was discussed" and "presents considerable legal and practical difficulties which need to be examined."

Moreover, evaluation of the events relied on by the petitioner against the broad background of recent history furnishes still additional evidence that the declared war against Germany has not been ended for the purposes of the Alien Enemy Act. First, it must be noted that the establishment of the Allied High Commission for Germany and Mr. McCloy's appointment as United States High Commissioner did mark a transition from military to civilian control on the part of the occupying powers and the change meant that Mr. McCloy was thereafter directly responsible to the Secretary of State rather than, as formerly, to the Secretary of War as United States Military Governor. It also meant that the close supervision of the details of administration of government were relinquished to the new German Federal Republic, whose formation coincided with that of the Allied High Commission. However, it is equally clear that the creation of the Commission and Mr. McCloy's appointment to it

represented merely a new phase in the military occupation of Germany. Thus, the Commission retained direct control and power to assure realization of the chief purposes of the occupation. (State Department Bulletin, volume 21, p. 512, October 3, 1949). To implement that control, the Charter of the Allied High Commission expressly required the forces of occupation of the three powers in Western Germany to remain stationed in their respective zones. The Charter further provided that it was the responsibility of the Commissioners to insure the protection, prestige and security of the allied military forces of occupation. In fact, no troops were withdrawn because of the shift from military government to Allied High Commission rule, and Mr. McCloy has pointed out that the armed forces will be maintained with the same "high state of efficiency and alertness" which characterized their operation during the period of direct military government. See State Department Bulletin, volume 21, page 272, August 22, 1949. Certainly, the continued presence of our armies in Western Germany makes fully applicable here the following statement from the *Ludecke* opinion (335 U. S. 160, 169):

> It is still true, as was said in the opinion in that case which eyed the war power most jealously, "We have armies abroad exer-

> cising our war power and have made no peace terms with our allies, not to mention our principal enemies." *Woods* v. *Miller Co.* [333 U. S. 138], at p. 147 (concurring opinion).

Under these circumstances, it is clear, as observed by the court below, that "the state of war with Germany is not yet terminated and that the powers of the Attorney General to deport enemy aliens still remain" (R. 25).

b. Petitioner's argument that he is not an alien enemy is so groundless that it was not even discussed in the opinion of the court below, despite the fact that there, as here, the contention was pressed by petitioner. He admits that he was born in Hamburg, Germany (R. 19), and that he has never acquired citizenship in the United States. Petitioner further recognizes (Pet. 21), that under the Alien Enemy Act a person is a "native" of the state or nation in which the place of his birth is at the time of his proposed deportation. *United States ex rel. Willumeit* v. *Watkins,* 171 F. 2d 773 (C. A. 2), affirmed January 16, 1950, No. 82, 1949 Term; *Bauer* v. *Watkins,* 171 F. 2d 492 (C. A. 2); *United States ex rel. Gregoire* v. *Watkins,* 164 F. 2d 137 (C. A. 2); *United States ex rel. D'Esquiva* v. *Uhl,* 137 F. 2d 903 (C. A. 2). Since petitioner is a "native" of Germany and never acquired citizenship here, it is obvious that he is subject to the removal provisions of the Alien Enemy Act.

It is urged, however, that the new German Federal Republic, in which Hamburg is located, is not "at war" with the United States and that petitioner cannot therefore be deemed to be a "native" of "enemy" territory or an alien enemy. This argument is simply a restatement of petitioner's basic contention that we are no longer at war with Western Germany. And, as we have pointed out above, that basic contention is completely lacking in merit.

c. Similarly, petitioner's claim that he is entitled to a judicial review of the cause and basis of his attempted removal "on the merits" (Pet. 24), ignores the direct holding to the contrary in the *Ludecke* case. As this Court there observed, the Alien Enemy Act is valid even though the only questions subject to judicial review are whether the person restrained is in fact an alien enemy 14 years of age or over, whether a "declared war" exists,[1] and whether the Act is constitutional (335 U. S. 160, 171).

In arguing for a broader scope of review, petitioner relies on the provisions of the Treaty of Friendship, Commerce and Consular Rights, signed on December 8, 1923 (44 Stat. 2132) be-

[1] The question of the existence of a "declared war" is to be distinguished from the question as to the methods by which a state of war may be terminated. As observed in the *Ludecke* opinion, such termination may be accomplished only by treaty, legislation or Presidential proclamation, and not by judicial action.

tween the United States and Germany. Article 1 of that treaty, he points out, allows him, as a German national, access to our courts and also prohibits the taking of his property without due process of law. Petitioner then argues that his proposed removal from the United States is "without due process of law" because no hearing or trial was accorded petitioner before any court (Pet. 26). As has been noted, this argument ignores the holding in the *Ludecke* case to the effect that a removal order is valid and enforceable even though there has been no judicial review of its merits. Moreover, the treaty itself had an express stipulation reserving to each of the parties, during time of war, the right to prevent from operating within its jurisdiction enemy nationals whose presence "it may consider prejudicial to public order and national safety." 44 Stat. 2132, 2143. Even apart from such an express provision, it is obvious that the treaty provision, if construed as suggested by petitioner so as to interfere with the removal of alien enemies dangerous to the public safety of the United States, would be deemed completely abrogated by the war because, as so construed, its terms would be incompatible with the existence of a state of war. *Karnuth* v. *United States,* 279 U. S. 231; see *The Sophie Rickmers,* 45 F. 2d 413 (S. D. N. Y.); *Ex parte Zenzo Arakawa,* 79 F. Supp. 468, 472 (E. D. Pa.). Cf. *Clark* v. *Allen,* 331 U. S. 503, 508.

2. Petitioner's final argument is that he was entitled to a hearing before the district court in order to give testimony as to the allegations in his petition and in his traverse to the return. Examination of the brief filed by petitioner in the court below reveals that this question was not raised in the court below. Nor is there anything in the record filed with this Court or in the court below which would support petitioner's claim that he applied for a hearing to adduce proof and that this application was denied. In any event, since no issue of fact was raised by the petition and traverse, it is clear that there was no need of receiving evidence and that petitioner was not entitled to a hearing to enable him to present evidence. *Todaro* v. *Munster,* 62 F. 2d 963 (C. A. 10), certiorari denied, 289 U. S. 738; *Ex parte Zenzo Arakawa,* 79 F. Supp. 468, 473 (E. D. Pa.); see *Walker* v. *Johnston,* 312 U. S. 275, 284. The only issues raised in the proceeding were questions of law, as to which it is not disputed that the district court heard argument (Pet. 4).

CONCLUSION

The judgment of the court below is correct and there is no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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JANUARY 1950.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067–4070, as amended, 50 U. S. C. 21–24, provides:[1]

> § 21. Restraint, regulation, and removal. Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the

[1] The section numbers used are those which appear in Title 50 of the United States Code.

premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

§ 22. Time allowed to settle affairs and depart.

When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native, citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality (R. S. § 4068).

§ 23. Jurisdiction of United States courts and judges.

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing

on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed (R. S. § 4069).

§ 24. Duties of marshals.

When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be (R. S. § 4070).

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (59 Stat., Part 2, 870; 10 Fed. Reg. 8947):

A PROCLAMATION

Whereas section 4067 of the Revised Statutes of the United States (50 U. S. C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any

other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U. S. C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the

United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

[SEAL] HARRY S. TRUMAN.

JAMES F. BYRNES,
Secretary of State.

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189, as amended, 13 F. R. 8291) pursuant to Presidential Proclamation 2655 (28 CFR, 1949 ed.):

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U. S.

Sec.

30.1 Removal from the United States of alien enemies.

30.2 Order of the Attorney General.

30.3 Service of removal order on alien enemy.

30.4 Thirty-day period for voluntary departure.

30.5 Involuntary removal from the United States.

AUTHORITY: §§ 30.1 to 30.5 issued under R. S. 4067, as amended; 50 U. S. C. 21.

§ 30.1 *Removal from the United States of alien enemies.* The Proclamation of the President of the United States, No. 2655, 3 CFR, 1945 Supp., dated July 14, 1945, provides in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and

safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.2 *Order of the Attorney General.* When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen or subject.

§ 30.3 *Service of removal order on alien enemy.* A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.4 *Thirty-day period for voluntary departure.* An alien enemy who is subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from internment

under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.5 *Involuntary removal from the United States.* In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM C. CLARK,
Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1950